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Supreme Court of the United States

October Term, 1975
No. 75-1242

CITY OF EUCLID, OHIO,
Petitioner,
vs.
ROYAL AMERICAN CORPORATION, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENTS IN OPPOSITION

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENTS IN OPPOSITION

The citations to the other opinions and journal entries entered herein and the jurisdictional statement as stated by the petitioner are correct. The singular issue before the Court is whether a legislative enactment which provides for once a week waste collection at single and two family dwellings, but excludes such collection at apartments and condominiums, constitutes an arbitrary and discriminatory classification which denies to the owners and occupants of the excluded dwellings constitutional rights under the Equal Protection Clause of the Fourteenth Amendment.

In addition to the statutes cited by petitioner, the Court is referred to the following:

Ohio Constitution, Article XVIII, Section 3 (Home Rule Provision):

"Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitation and other similar regulations, as are not in conflict with general laws."

Ohio Revised Code Section 715.43:

"Any municipal corporation may provide for the collection and disposition of sewage, garbage, ashes, animal and vegetable refuse, dead animals, and animal offal, and may establish, maintain, and regulate plants for the disposal thereof."

STATEMENT OF THE CASE

The instant matter finds its origins in March of 1972. Prior to that time, the Service Department of the City of Euclid had collected rubbish and garbage of tenants and occupants of respondent as well as apartments and condominiums of others. Effective March 1, 1972, however, the City of Euclid, through its Mayor and Service Director, discontinued waste collection from all apartments in the City for purported reasons of financial restrictions. The service to condominiums, although initially suspended, was reinstated.

As a result of that action, Royal American Corporation brought suit in the Court of Common Pleas of Cuyahoga County against the City of Euclid. (That suit was designated as Case No. 904,622; the trial court's decision is part of the record in this case.) The trial court, in that case, held

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that it was illegal for the Mayor and Service Director to unilaterally discontinue the waste collection from apartments; however, the Court proceeded to make certain comments regarding classifications of dwellings which could or could not be serviced. The trial court granted a mandatory injunction against the City in favor of Royal American Corporation, but stayed execution of the injunction in order to permit the Euclid City Council to enact legislation. That case was appealed to the Court of Appeals of Cuyahoga County, Eighth Appellate District, by both Royal American Corporation and the City of Euclid. (Those cases were designated as Case Nos. 33353 and 33432 and the Court's decision in those cases is set forth herein at Appendix page 19.) The Court of Appeals upheld the trial court's determination that the Mayor and Service Director had acted illegally and beyond their authority in terminating the rubbish and garbage collection service to apartments. Regarding the trial court's discussion of dwelling classifications, the Court of Appeals indicated that such comments by the trial court were far beyond the scope of the issues in that case and, therefore, constituted only dicta and ". . . had no real bearing on the relief as sought, or what was reasonably to be included within the decision and order." The Ohio Supreme Court, upon review, denied the motion to certify by Royal American Corporation, and the cross motion to certify by the City of Euclid.

The petitioner's factual statement, contained on page 6 of its petition, to the effect that the Ohio courts indicated that the classification involved in the instant case would be proper if done legislatively is a misstatement. It is true that the trial court, in the prior case, so intimated, and it may have been on that basis that the Council of the City of Euclid enacted the Ordinance which is in question in this

case; however, the trial court's action was clearly repudiated by the Court of Appeals of Cuyahoga County.

While Common Pleas Case No. 904,622 was traveling through the appellate courts, the City Council of Euclid, on February 4, 1974, enacted Ordinance 27-1974. On February 7, 1974, plaintiffs, by their counsel, wrote to the Law Director of the City of Euclid requesting that the Law Director seek repeal of Section 941.26, Codified Ordinances of Euclid, which was enacted in Ordinance 27-1974 or obtain an injunction restraining the enforcement of said Ordinance. No reply was ever received to said correspondence although it was received by the Law Director. On February 19, 1974 the Euclid City Council enacted Ordinance 48-1974 which did repeal Ordinance 27-1974 but at the same time it enacted Ordinance 49-1974 which was virtually identical to Ordinance 27-1974. Both Ordinance 27-1974 and Ordinance 49-1974 dealt with the enactment of a new Section 941.26 of the Euclid Codified Ordinances which states as follows:

> "The City will not collect any solid waste materials from (1) any apartment or condominium structures or (2) any commercial structures in the City of Euclid."

The full text of Ordinance 49-1974 is set forth at pages 3-4 of the City's petition for certiorari. It is the constitutionality of Ordinance Section 941.26 which is the subject of the instant case.

On July 19, 1974 Royal American Corporation,[1] owner and operator of an apartment dwelling in the City of Euclid filed a taxpayer's suit under Ohio Revised Code

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1. On August 26, 1974 Perma Investment Company, Inc. and Elmack Investment Company joined as additional parties plaintiff as they held the bare legal title to the apartment property.

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§ 733.59[2] against the city contending that Section 941.26 was unconstitutional and that apartments and condominiums were entitled to the same and equal service as that afforded to single and two family dwellings.

On September 3, 1974 the trial court issued a judgment entry holding that Section 941.26 was constitutional and was a reasonable classification. On September 13, 1974 an appeal was filed by Royal American Corporation to the Court of Appeals. On August 21, 1975 the Court of Appeals entered its journal entry and opinion holding that Section 941.26 enacted in Ordinance 49-1974 did create an unreasonable classification and discrimination against owners and occupants of apartment dwellings and that such arbitrary and unreasonable classification was improper and unconstitutional.

On December 5, 1975 the Ohio Supreme Court dismissed the City's appeal thereby upholding the decision of the Court of Appeals.

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2. The statute provides: "If the solicitor fails, upon the written request of any taxpayer of such municipal corporation, to make any application provided for in Sections 733.56 to 733.58, inclusive, of the Revised Code, such taxpayer may institute suit in his own name, on behalf of the municipal corporation. Any taxpayer of any municipal corporation in which there is no solicitor may bring such suit on behalf of such municipal corporation. No such suit or proceeding shall be entertained by any court until the taxpayer gives security for the cost of the proceeding."

ARGUMENT

A legislative enactment providing for waste collection at single and two family dwellings, but excluding such collection at apartments and condominiums, constitutes discriminatory classification and denies to the owners and occupants thereof equal protection under the Fourteenth Amendment.

Under Ohio Revised Code, Section 715.43, and under the Home Rule Clause of Article XVIII, Section 3 of The Ohio Constitution, a home rule municipality such as the City of Euclid, has the power and general authority to provide for the collection of garbage, refuse and solid wastes. The City of Euclid provides for this subject matter under Chapter 941 of its Codified Ordinances.

The law in Ohio is clear that when a municipality undertakes to provide for municipal rubbish and garbage collection, it is performing a governmental function and acting in the exercise of its police power. *State ex rel. Moock v. City of Cincinnati*, 120 Ohio St. 500 (1929) and *Broughton v. City of Cleveland*, 167 Ohio St. 29 (1957).

As the Court of Appeals stated in its decision:

> "Revised Code Section 751.43 permits a municipality to provide for the collection and disposition of garbage and rubbish and to maintain plants for its disposal. However, any municipal legislation relating to garbage collection and disposal enacted pursuant to this Statute must be reasonable and not arbitrary or oppressive." (page A8, Petition for Certiorari.)

The Court of Appeals was totally correct in its analysis of Ordinance 49-1974 when it noted that the classification ". . . denies apartment dwellers the same rights vouchsafed their counterparts in two family dwellings."

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(page A8, Petition). The Court also noted that the classification set forth in Ordinance 49-1974 was made upon the basis of the physical structure of the building and the costs of collection and did not take cognizance that people in apartments and people in single or two family dwellings produce the same type of garbage and refuse. The Court stated (pages A8-A9, Petition):

> "Citizens living in both types of residences require the removal of their garbage and rubbish on a regular basis for health and safety reasons. There is no rational basis for the municipal decision not to collect garbage from inhabitants of apartments on the one hand and to collect it from inhabitants of residential dwellings on the other. Thus Ordinance 49-1974 contravenes the principle of equal protection. See *Yick Wo v. Hopkins* (1886), 118 U.S. 356, 373-374, 30 L. Ed. 220, 227."

There are a number of cases which clearly support the logic and decision of the Ohio Supreme Court and the Court of Appeals.

In the case of *Leroy Franz, Inc. v. City of New Rochelle*, 124 N.Y.S.2d 525 (Sup. Ct., 1953), the Court was faced with a situation where the plaintiff was the owner of a 14 story commercial and office building. The City had enacted an Ordinance limiting collection from commercial activities to two cartons but no such limitation applied to apartments or residences. In fact, the ordinance in question placed apartments in the same classification as single and two family dwellings. At page 528, the Court stated:

> "Classification in legislation is not forbidden. The law merely requires that legislation shall apply equally to all persons similarly situated. Where it so applies, it may not be avoided upon the ground that it ap-

plies solely to a particular class of persons, provided of course, that the classification is not arbitrary or unreasonable."

Additionally, the Court stated at page 528:

"A limitation as to the collection by a municipality of refuse from office, commercial, industrial and similar buildings, in behalf of the owners, occupants or other persons in charge thereof, while assuming full collection from residential properties or units, is not deemed to be in the category of arbitrary and unreasonable class or discriminatory legislation. *The exemption of dwellings and apartments from the provisions for limited collection of garbage and refuse may readily be justified.* This is so, first, because plainly such premises, residential in nature, are reasonably to be placed in a separate class from offices, stores, industrial buildings and other business establishments. Secondly, the bulk of the refuse collected from the former is raw garbage and decaying material, thereby presenting a health problem, while the refuse from business establishments consists generally of readily burnable and disposable material." (Emphasis added)

In the case of *Boulevard Apartments, Inc. v. Borough of Lodi,* 110 N.J. Super. 406, 265 A.2d 838 (Supreme Court, Appellate Division, 1970), the plaintiff was the owner of garden type apartment complexes consisting of six two-story buildings and containing a total of 108 family units. Prior to January 1, 1969 the municipality had collected rubbish from these buildings, but after that date the municipality enacted an ordinance excluding apartments from collection. Plaintiff then brought suit against the municipality contending that the legislation was unreasonable and discriminatory. The municipality had a private contractor doing rubbish and garbage collection and it was testified that if the municipality was required to col-

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lect garbage from garden type apartments it would be exposed to an additional cost of between $75,000-$85,000. The Court also noted that there was testimony regarding comparison of per acre population density of garden type apartment houses and that of ordinary residences. The Trial Court had held that the Ordinance was reasonable on the basis that apartments were not in the same category or classification as other types of residential dwellings "because they were commercial ventures. . . ." (265 A.2d at 840).

The Appellate Court reversed and held that the non-inclusion of apartment dwellings was discriminatory classification. At 265 A.2d 841, the Court stated as follows:

> "We can discern no rational basis for differentiating between garden-type apartment houses and all other residential dwellings, because apartments are rented to tenants and the owner may realize a profit on his investment. The resolution in question makes no distinction between owner-occupied dwellings and those rented for income. The evidence reveals that there are numerous rented multi-family dwellings containing from two to eight family units which are not precluded from receiving municipal garbage collection service. Moreover, the resolution on its face provides for collection from public housing projects and various places of business.
>
> We also find no reasonable justification for the municipality to classify garden-type apartment houses differently from other residential dwellings on the basis of the quantity of garbage produced and the cost of collection thereof. It is apparent that the trial court misunderstood the testimony in arriving at a conclusion that the quantity of garbage produced from each garden apartment family unit was three times that of a private dwelling. The record clearly shows

that the garbage produced by a one-family unit in an apartment house and a one-family dwelling house is substantially the same. Moreover, it is clear that the cost of collection from family units in an apartment house where the accumulated garbage is concentrated in one spot to be picked up at the curb is unquestionably less than the cost of collection from an equal number of family units residing in separate private dwellings.

We conclude that the part of the municipal resolution which classifies garden-type apartment houses separately from other dwelling houses and thereby denies such properties an equal right to garbage collection service is unreasonable, discriminatory and invalid and cannot be enforced."

After *Boulevard Apartments, Inc. v. Borough of Lodi* was reversed, the municipality enacted an ordinance providing that rubbish collection was to be made at curbside only. Suit was then brought claiming that the collection ordinance was discriminatory. The curbside collection ordinance was reviewed by the New Jersey Supreme Court in *Pleasure Bay Apartments v. City of Long Beach,* 66 N.J. 79, 328 A.2d 593 (1974).

Contrary to petitioner's suggestion, the New Jersey Supreme Court, in the *Pleasure Bay Apartments* case, did not criticize or repudiate the *Boulevard Apartments, Inc.* case. *Boulevard Apartments, Inc.* considered substantially the same question involved herein and held that it was discriminatory classification violative of equal protection when a city undertakes waste collection to single family dwellings and not to render equivalent treatment to garden-type apartments. The *Pleasure Bay Apartments* decision considered only the constitutional validity of a method of collection, i.e., curbside service. *Pleasure Bay* reaffirmed the earlier pronouncement that single family

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and multiple family dwellings were entitled to equal treatment.

The New Jersey Supreme Court specifically noted that:

> "The requirement of the defendant that the plaintiffs place its garbage at curbside in small containers containing refuse produced by each apartment is an attempt to circumvent the edict of the court in the case of *Boulevard Apartments, Inc. v. Mayor and Council of Lodi*, 110 N.J. Super. 406, 265 A.2d 838 (1970). (328 A.2d at 595)
>
> * * * * *
>
> "All that a property owner is entitled to is that the municipal action—here the determination to limit the municipal service to curbside collection of garbage and refuse—not deny him due process and equal protection of the laws." (328 A.2d at 599)

The New Jersey Supreme Court held that so long as the curbside service was made available equally to single family and to apartment owners then the Ordinance was constitutional.

In the case of *Leim Peter's Disposal Service, Inc. v. Borough of Carteret*, 121 N.J. Super. 18, 295 A.2d 411 (Superior Court, 1972), the Court had under consideration an ordinance dealing with the mode of rubbish collection in that the ordinance provided that only the municipality had the authority to collect rubbish and garbage. The court upheld the municipality's right to have exclusive control over the rubbish and garbage collection for residential and apartment purposes and made the following observation (295 A.2d, pages 414-415):

> "Different considerations govern municipal treatment of these distinct classes. A municipality may not fa-

vor individual residences over multi family dwellings in providing garbage collection service."

* * * * *

"A municipality must treat its residents alike with respect to municipal waste collection, but it is nonetheless free to prohibit a given means of disposal to further the public health."

In the case of *Teagin Company v. Borough of Burgenfield*, 119 N.J. Super. 212, 290 A.2d 753 (Superior Court, 1972), the Court was faced with a situation where the municipality had experienced a rapid population growth. The Borough had a population of 29,000 with 1,000 multi-family dwelling units situated in multi-family buildings having in excess of six units per dwelling. The plaintiffs in the *Teagin* case were operators of a garden apartment complex containing over 600 dwelling units. The court held that the municipality was required to collect the rubbish and garbage of the plaintiffs and that the municipality's actions in refusing to collect from them in the same manner as collecting from single family residences was in violation of equal protection. At 290 A.2d 758, the Court succinctly observed:

". . . where no attempt has been made to arrive at a classification based on real differences to support a difference in treatment with respect to municipal services, or where the grounds upon which the classification is made are irrelevant to the achievement of the end sought, the governmental action is wholly arbitrary and must be declared such." (Citations omitted)

In 6 UNIVERSITY OF RICHMOND LAW REVIEW 141, *Administration of Municipal Services in Light of the Equal Protection Clause* (1971), the author aptly stated at pages 144-145:

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> "While there is no constitutional necessity for a municipality to provide services to its citizens, once it elects to do so, services must be administered on a nondiscriminatory basis."

Additionally, it was observed that (pages 145-146):

> "The most obvious standard, of course, would be the quality of services enjoyed by those citizens who are favored by discriminatory practices. Any variation from the same quality of service would require further judicial scrutiny to determine whether the classification among citizens is rationally based. Whatever the standard, a check on municipal abuse of discretion within the framework of equal protection of the laws should not be found to be an infringement on separation of governmental powers."

See *Hawkins v. Town of Shaw*, 437 F.2d 1286 (5th Cir., 1971) and compare *Baker v. Carr*, 369 U.S. 186 (1962).

In *Alexander v. City of Detroit*, 392 Mich. 30, 219 N.W.2d 41 (S. Ct., 1974), the Michigan Supreme Court considered the validity of a waste collection ordinance which classified apartments of more than four units as commercial which thus required the payment of fees in order to have the rubbish collected. The Court succinctly ruled (219 N.W.2d at 43):

> "Applied to the instant factual situation we hold that inclusion of multiple dwellings with a more than 4 units in the fee-paying 'commercial waste' category while multiple dwellings with 4 or less units and condominiums and cooperatives were excluded, was a constitutionally improper classification violative of the state and federal guarantees of equal protection. Const. 1963, Art. I, §1, United States Const. Art. XIV, §1."

Additionally, the Court commented at page 45:

"'For Ordinance 442-G to declare that "Domestic waste" in multiple dwellings of more than 4 units is "Commercial waste", is to declare a sudden transformation by name only. *Ordinance 442-G attempted a distinction without a difference* which is arbitrary, unreasonable, and violative of the equal protection clauses of the Federal and State Constitutions.' (506a)" (Emphasis in Original)

"Thus, Detroit City Ordinance 442-G is found to be unconstitutional on equal protection grounds by reason of improper classification of plaintiffs' subject properties. The Court of Appeals is reversed on this score."

The Court's reasoning and the pertinent facts enunciated in *Alexander* are equally applicable to the instant case.

The New Jersey and Michigan courts, and now the Ohio courts, have upheld the respondent's contention that Ordinance 49-1974, or one similar thereto, does create an arbitrary and discriminatory classification, which is not protected or condoned by the U. S. Constitution. The one case which does give some comfort to the City's position is that of *Goldstein v. City of Chicago*, 504 F.2d 989 (7th Cir., 1974). Initially, it should be emphasized that the Court of Appeals concurred with the District Court in observing that: "The determination of the issue presented depends entirely upon a question of state law, i.e., the interpretation of the ordinance." (504 F.2d at 991) Unlike *Goldstein*, all of the cases relied upon by Royal American Corporation are state court decisions involving the interpretations of state law and local ordinance. Additionally, in *Goldstein*, the plaintiffs did not directly attack the constitutional validity of the ordinance, but rather were argu-

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ing as to method and manner of the rubbish collection. The defense in *Goldstein* was that there was no rubbish collection of condominiums and multiple dwellings because there was a specific ordinance prohibiting such collection. Notwithstanding that situation, however, there was no suit directly attacking the constitutional classification of the ordinance. On the contrary, however, in the instant case, in *Alexander v. City of Detroit,* in *Boulevard Apartments, Inc. v. Borough of Lodi* and in *Teagin Company v. Borough of Burgenfield,* a direct attack on the ordinance was made by respective plaintiffs.

Respondent recognizes that the Court, in *Goldstein,* did conclude that a proper class distinction does exist between single family dwellings and multiple family dwellings, notwithstanding that the occupancy of the dwellings is identical, and that this conclusion is not harmonious with the cases cited by this respondent elsewhere in its brief. However, merely because one court has reached a conclusion somewhat different than several other cases, does not, *ipso facto,* mandate or necessitate this Court reviewing that apparent conflict by granting a petition for certiorari. On almost any particular question of law, it cannot be gainsaid that cases supporting either of the respective views could be cited to the Court but the mere existence of differences between certain courts does not require review by this Court.

In the instant case the City of Euclid has sought to differentiate and establish separate classifications based solely on the nature of the physical structure in which a resident of the City of Euclid happens to be living. The testimony was undisputed that the general character of the individuals living in the City of Euclid was residential whether it be in single family or multi family dwellings. The essential aspect is that the character and quality of life in a single family residence is virtually identical to that

existing in a multifamily type structure. The basic individual and family activities which are found in a single family structure are similarly found in a multifamily structure. The garbage and refuse collected for single families are identical to the refuse and garbage collected for multifamilies. To justify a classification in the rendering of rubbish collection based solely on the type of physical structure in which a resident lives is both unreasonable and discriminatory. As the Court, in the *New Rochelle* case, very cogently observed, there are significant differences between activities conducted in residential types of dwellings *vis-a-vis* industrial or commercial, but the activities in one type of residential dwelling *vis-a-vis* another type of residential dwelling are essentially the same. In *Alexander, supra*, the Court said it was a "distinction without a difference" and thus arbitrary.

During the hearing on the merits, the primary thrust of the City, in support of the validity of the ordinance, was the economic necessity of eliminating rubbish and garbage collection from apartments. There was no testimony that there might be alternative methods of financing but simply that under the current budget of the City, rubbish collection would have to be discontinued for apartments. Economic necessity was also the defense in *Shapiro v. Thompson*, 394 U.S. 618, 22 L. Ed. 2d 600, 89 S. Ct. 1322 (1969), however, this Court held that fiscal concerns are subordinate to the constitutional concerns of equal protection. As this Court commented (394 U.S. at 633):

> "We recognize that a state has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education or any other program. But a state may not accomplish such a purpose by invidious distinction between classes of its citizens. It could not, for example, reduce expendi-

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> tures for education by barring indigent children from its schools. Similarly in the cases before us, *appellants must do more than show that denying welfare benefits to new residents saves money. The saving of welfare costs cannot justify an otherwise invidious classification.*" (Emphasis added)

Cf. *Hawkins v. Town of Shaw*, 437 F.2d 1286 (5th Cir., 1971).

The City has contended that the rationale and justification of the enactment of Ordinance 49-1974 was for economic reasons. Although various financial, personnel and construction costs regarding waste collection were presented to the trial court, the record is devoid of any such data or information being presented to Council, or any of its committees, at the time that Ordinance 49-1974 was under consideration. There was no legislative history regarding the Ordinance although the minutes of the Council which pertained to the consideration of Ordinance 49-1974 were in evidence before the Court as stipulated exhibits. Nowhere therein is there any discussion of a financial disaster coming to the City of Euclid if Ordinance 49-1974 were not passed. It is also ironic that in the preliminary "whereas" clauses dealing with a statement of reasons for the enactment, the Council specifically made reference to the prior Common Pleas Court decision (Case No. 904,622) but made no reference to any economic plight.

Although the trial court did uphold the constitutionality of Euclid Ordinance 49-1974, the Court of Appeals specifically reversed and held that the classifications in the ordinance were discriminatory. Even though the Ohio Supreme Court did not specifically rule on the merits of the case, the court procedurally did refuse to review the case, thus letting the decision of the Court of Appeals

stand. In this case, therefore, there has been specific and direct review of the constitutionality of Ordinance 49-1974 by the appellate courts of Ohio which have ruled in favor of this respondent. The Ohio Supreme Court stated in its order that there was no substantial constitutional question in this case, and that conclusion likewise should be entertained by this Court.

CONCLUSION

The petitioner has not set forth sufficient and cogent reasons for this Court to intervene and review the decisions of the Ohio appellate courts. The decisions of the highest courts of Michigan, New Jersey and Ohio have substantively upheld respondent's contention and right to equal treatment regarding waste collection by a municipality. For the reasons set forth, it is therefore respectfully prayed that the petition of the City of Euclid, Ohio, for a writ of certiorari to the Supreme Court of Ohio be denied.

Respectfully submitted,

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APPENDIX

DECISION OF THE COURT OF APPEALS IN CASES NOS. 33353 AND 33432

(Dated August 15, 1974)

IN THE COURT OF APPEALS OF OHIO
EIGHTH DISTRICT, CUYAHOGA COUNTY

No. 33353

ROYAL AMERICAN CORPORATION,
Plaintiff-Appellant,

vs.

CITY OF EUCLID, OHIO, *et al.*,
Defendants-Appellees.

No. 33432

ROYAL AMERICAN CORPORATION,
Plaintiff-Appellee,

vs.

CITY OF EUCLID, OHIO, *et al.*,
Defendants-Appellants.

MEMORANDUM TO LAWYERS

HOLMES, *J.*

This matter involves the appeal of an order as entered by the Common Pleas Court of Cuyahoga County in a matter tried to the court, wherein the plaintiff Royal American Corporation had filed an original action seeking a mandatory injunction as against the defendant City of Euclid,

and its mayor and service director, in order to mandate such defendants to resume the collection of garbage and refuse by the city from the apartment units as owned by the plaintiff corporation.

The facts in brief upon which this appeal rests are as follows. The Royal American Corporation, the plaintiff herein, is the owner and operator of a number of residential apartments in the city of Euclid, Ohio, known as the Willow Arms Apartments. Prior to March 1, 1972, the defendant city of Euclid, through its service department, had collected rubbish and garbage of the tenants and occupants of the plaintiff apartments as well as apartments of other owners. The record shows that the mayor, upon being apprised of the financial condition of the city, informally discussed the matter of garbage and refuse collection with the members of the city council, and told the council members of his determination to send a directive to the service director to discontinue the collection of garbage and refuse to apartment units subsequent to March 1, 1972. There was no specific ordinance as passed by council, discontinuing the service to apartment dwellings.

Such collection service was in fact discontinued to apartment units effective March 1, 1972; however, the record shows that the city did continue to pick up the garbage and rubbish of two condominium dwellings after such date.

The record will show that the city of Euclid continued to pick up refuse and garbage from one-, two- and three-family units, and the record shows that the refuse and garbage collection was also discontinued for all commercial types of stores and buildings.

The plaintiff brought its action seeking a temporary restraining order enjoining defendants from failing and

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refusing to pick up and collect rubbish and garbage of the plaintiff's tenants, and also sought in such action preliminary and permanent injunctions. The complaint also prayed for damages suffered by the plaintiff, for reasonable attorney fees and costs of the suit, and such other and further relief as the court may deem proper.

In the decision of the trial court we find under "Issues and Discussion" the following determinations, in essence, as made by the court that:

1. The instant action was brought for the personal benefit of the plaintiff apartment owner for the benefit and interest of its own activities and not in the interest of all taxpayers of the city of Euclid, and therefore such action was not a taxpayer's action.

2. The remedy of mandatory injunction was the proper procedure in the instant case.

3. The executive officer of a municipal corporation may not act to discontinue a service, but that such action must be by the legislative body.

4. Although the administrative action was improper in establishing classifications for garbage and refuse collection, council could act to establish classifications. [More specifically, the trial court found "that city council through proper legislation can enact classifications as to collection of garbage and refuse consisting of (1) apartments and condominiums; (2) single, two- or three-family units; (3) commercial; (4) industrial.]

5. An award for damages and attorney fees was not proper in this action, in that the trial court had previously determined that such was not a taxpayer's action.

Based upon such conclusions, the trial court granted a mandatory injunction requiring the administrative of-

ficers to resume the collection of garbage and refuse from the plaintiff corporation apartments and all others similarly situated. However, the trial court seemingly limited the effectiveness of its judgment entry by the further holding as follows: "Such mandatory injunction will not become effective until February 18th, 1974, this to permit Council to consider the adoption of legislation establishing classification for collection of garbage and refuse. It is further ordered, adjudged and decreed that if such legislation is adopted the mandatory injunction will not become effective on that date but if legislation is not adopted by Council on that date the mandatory injunction will be effective as of February 18, 1974."

The plaintiff Royal American Corporation appeals the judgment of the trial court, assigning the following assignments of error:

"1. The trial court erred in holding that the lawsuit was not a taxpayer's action.

"2. The trial court erred in holding that attorney fees were not allowable.

"3. The trial court erred in holding that there was no basis for any award of damages."

The defendants, city of Euclid, et al., filed a notice of appeal from the judgment of the Common Pleas Court, and thereafter filed their answer and cross-appeal herein, setting forth four "Assignments of Error." However, numbers II and III of such "assignments of error" of the city of Euclid, et al., are in fact arguments of the assignments of error of the Royal American Corporation, plaintiff-appellant.

Numbers I and IV, which may be considered as the assignments of error of the city of Euclid, are as follows:

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"I. The administrative rules and regulations of the service director in limiting collection to single, double, and triple family dwelling structures was authorized, had the effect of an ordinance, and not an abuse of discretion.

"IV. The trial court erred: in finding an abuse of discretion on the part of the mayor and director of public service; in enjoining the city to collect solid wastes from all apartments in the city, including plaintiff's, in the absence of certain classification legislation; and in failing to modify the injunction to clarify the classification legislation required to avoid the court's injunction."

The plaintiff Royal American Corporation then, on February 14, 1974, filed a motion to dismiss the appeal of of the city of Euclid, Ohio, on the basis that the cross-appeal as filed by the city of Euclid was not timely filed in accordance with Rule 4(A), Rules of Appellate Procedure.

The matter is now before this court, not only upon the merits of such matter, but also upon the question of the motion of the Royal American Corporation to dismiss the cross-appeal of the city of Euclid, Ohio, et al.

The record will show that the judgment entry in this matter was journalized by the clerk of the Common Pleas Court of Cuyahoga County on January 3, 1974. On January 9, 1974, the plaintiff Royal American Corporation filed a notice of appeal from such judgment entry in case number 33353 of this court. The record will show that on February 8, 1974, the defendant city of Euclid, et al., filed their notice of appeal.

Rule 4(A) of the Rules of Appellate Procedure provides that a notice of appeal "shall be filed with the clerk of the trial court within thirty days of the date of the en-

try of the judgment or order appealed from." Such rule also provides that a cross-appeal may be taken within ten days after the notice of appeal is filed or within thirty days, whichever period expires last. The calculation of the appropriate time in the instant case shows that the defendant would have had until February 3, 1974 to properly file a cross-appeal. Such not having been perfected timely, such cross-appeal must upon motion be dismissed.

However, even though we must dismiss the cross-appeal of the city of Euclid, the questions as posed in such cross-appeal may be considered by this court pursuant to other sections of the Rules of Appellate Procedure. Rule 12(A), in pertinent part, states: "The appeal shall be determined on its merits on the assignments of error set forth in the briefs required by Rule 16, on the record on appeal as provided by Rule 9, and, unless waived, on the oral arguments of the parties, or their counsel, as provided by Rule 21. Errors not specifically pointed out in the record and separately argued by brief may be disregarded. * * *"

Further, at Rule 12(B), we find in pertinent part: "* * * In all other cases where the court of appeals determines that the judgment or final order of the trial court should be modified as a matter of law it shall enter its judgment accordingly. * * *"

This matter was submitted to the trial court upon the pleadings, upon the briefs of counsel, and evidence was adduced before the trial court along with exhibits, and all of such matters are now before this court. Even though errors not specifically pointed out in the record and separately argued by brief may be disregarded, this court does not have to so disregard them. Where all of the record that was before the trial court is also before this court, this Court of Appeals may determine that the judgment

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or final order of the trial court should be modified as a matter of law and may enter a judgment accordingly.

Therefore, within the context of having the whole case before it, this court shall review any and all errors that might have taken place within the conduct of the trial of this matter, and enter its judgment accordingly.

We dismiss the first assignment of error of the plaintiff-appellant Royal American Corporation to the effect that the trial court erred in holding that the lawsuit was not a taxpayer's action. Suits by taxpayers are provided for through R. C. 733.59, which section of law provides that if the city solicitor fails, upon the written request of any taxpayer of such city, to make any application provided for in section 733.56 [injunction to restrain the misapplication of funds of the city, the abuse of corporate powers, or the execution or performance of any contract made in behalf of the corporation in contravention of laws or ordinance governing it, or which was procured by fraud or corruption]; 733.57 [specific performance of a contract made on behalf of a city]; 733.58 [mandamus to order an officer or board of a city to perform any duty expressly enjoined by law or ordinance]; then, in such instances, a taxpayer may institute a suit in his own name on behalf of the city.

Further, pursuant to such R. C. 733.59, a taxpayer of any municipal corporation for which there is no solicitor may bring such suit on behalf of such municipal corporation. Additionally, such section provides that no suit or proceeding shall be entertained by any court until the taxpayer gives security for the cost of the proceeding.

The record of this matter before this court, and the pleadings therein, would show that the defendant city of Euclid did in fact have a solicitor who could have

brought such action. Too, there is no showing that the taxpayer first requested such city solicitor or law director to institute such suit, nor that there was any failure of the solicitor to bring such suit after having been asked to do so. Further, it has not been specifically shown that any of the actions as provided for in R. C. 733.56 through 733.58 are such as contemplated within taxpayers' suits as provided. Lastly, there is no showing that this plaintiff taxpayer has paid any security for the costs of such proceeding. Therefore, on these statutory qualifications alone the plaintiff has not qualified as a taxpayer for purposes of a taxpayer's suit.

The basis for the action as brought by a taxpayer pursuant to R. C. 733.59 is to protect rights by and on behalf of the municipality which will inure to the benefit of all of the citizens and taxpayers of such municipality and such action cannot be maintained by an individual taxpayer, or group of individuals for their own capacities and benefits, but may only be brought in the sense of a representative capacity for the community as a whole. *Walker v. Village of Dillonvale* (1910), 82 Ohio St. 137; *Parks v. Cleveland Ry. Co.* (1931), 124 Ohio St. 79; *State, ex rel. Nimon v. Village of Springdale* (1966), 6 Ohio St. 2d 1.

The complaint of the Royal American Corporation evidences that such was being brought for and on behalf of this individual corporation to mandate a reinstitution of services to it, and for damages and attorney fees as alleged to be due such corporation. Such pleading does not set forth a cause of action which seeks the benefits for, nor if successful in the recovery to be shared in by a total group or classification of the citizenry of Euclid. Such complaint does not set forth a class action, and therefore the trial court was correct in this regard, and assignment

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of error number one of the Royal American Corporation is therefore dismissed.

As to plaintiff-appellant's assignment of error number two, to the effect that the trial court erred in holding that attorney fees were not allowable, such assignment must herewith be dismissed in that such case is not the type that any state statute specifically provides for attorney fees as part of the costs thereof, and having previously held that this matter is not a taxpayer's action, the court could not properly have made attorney fees as part of the costs of such case even though the plaintiff may have prevailed in such cause. See *State, ex rel. Scott v. Masterson* (1962), 173 Ohio St. 402, and *Brauer v. City of Cleveland* (1966), 7 Ohio St. 2d 94.

As to plaintiff-appellant's assignment of error number three, relative to the alleged error of the trial court in holding that there was no basis for any award of damages, in like manner such assignment of error must be dismissed, in that such complaint does not state a cause upon which relief for damages can be granted to this plaintiff. Any increase of the expenses of the operation of the plaintiff's apartments by virtue of the costs of garbage and refuse collection, based upon the determination of the city to discontinue such service, is a disadvantage as suffered by the taxpayer based upon a determination by an administrator of a governmental function and the resulting alleged damage is noncompensable as against the governmental entity in the performance or, in this instance, nonperformance of a governmental function.

The major issue involved within this case is that of the claimed illegal delegation of the legislative power of the legislative authority of the defendant municipality. A determination of such issue would require not only a brief review of the law in this regard, but also a review of the

facts in the instant case including the particular ordinance, the activity which is said to be in furtherance of such alleged delegation, and a review of that which was actually being done pursuant to such alleged delegation.

As stated in 38 Ohio Jurisprudence 2d, Municipal Corporations, at section 263: "It is fundamental that public powers conferred upon a municipal corporation and its officers or agents cannot be surrendered or delegated to others." Citing *Cincinnati v. Cook* (1923), 107 Ohio St. 223; *Cleveland v. Piskura* (1945), 145 Ohio St. 144. Also, see *Belden v. Union Central Life Ins. Co.* (1944), 143 Ohio St. 329.

In *Cincinnati v. Cook, supra*, we find the following statement of the general proposition of law as set forth in Judge Matthias' decision, at page 226:

> "This ordinance will not stand the test applied by 1 Dillon on Municipal Corporations (5 ed.), Section 244, from which we quote the following: 'The principle is a plain one that the public powers or trusts devolved by law or charter upon a council or governing body, to be exercised by it when and in such manner as it shall judge best, *cannot be delegated to others.*
>
> "It is stated by 1 McQuillin on Municipal Corporations, Section 382, that 'the principle is fundamental and of universal application that public powers conferred upon a municipal corporation and its officers or agents cannot be surrendered or delegated to others.' • • •
>
> "The principle here involved seems to be of universal application and is probably most concisely stated by Cooley on Constitutional Limitations (7 ed.), page 293, as follows: 'So far as its functions are legislative, they rest in the discretion and judgment of the municipal body entrusted with them, and that body

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cannot refer the exercise of the power to the discretion and judgment of its subordinates or of any other authority.' "

A concise statement of the principle has been set forth by the court in *Parks v. Cleveland Ry. Co., supra,* at page 98, as follows:

"The problem in the instant case is solved by the principle declared in *Field v. Clarke,* 143 U.S. 649, at page 694, 12 S.Ct. 495, 505, 36 L.Ed. 294, where the court quotes with approval from *Locke's Appeal,* 72 Pa., 491, 498, 13 Am. Rep. 716:

" 'The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government.' "

In *State, ex rel. Selected Properties, v. Gottfried* (1955), 163 Ohio St. 469, we find the rule set forth within the decision of the court at page 473:

"The rule is well summarized in the following statement in 37 American Jurisprudence, 778, Section 160:

" 'In accordance with settled principles that no American legislative body can constitutionally and validly delegate to administrative officers an exercise of discretionary power which is arbitrary, it is established that any municipal ordinance which vests an arbitrary discretion in public administrative officials with reference to the rights, property, or business of individuals, without prescribing a uniform rule of action, making the enjoyment of such rights depend upon arbitrary choice of the officers without reference to all persons

of the class to which the ordinance is intended to be applicable, and without furnishing any definite standard for the control of the officers, is unconstitutional, void, and beyond the powers of a municipality. * * *"

In *State, ex rel. Srigley, v. Woodworth* (1929), 33 Ohio App. 406, the court, in the third paragraph of the syllabus, placed the principle in the context of representation with the emphasis being upon the right to have the exercise of the legislative judgment be vested nondelegably within the legislative body. Such paragraph of the syllabus of such case is as follows:

"3. Municipal council cannot delegate to municipal officer power to decide upon legislative matters properly resting in judgment and discretion of council, since members of council are chosen by people to legislate, and public is entitled to their judgment and discretion, and not to judgment and discretion of some other to whom council may confide such power."

Conversely, it has been determined not to be a delegation of legislative power, if that activity as carried out by the administrative authority is only as to the details or the application of the principles, policy or standards as set forth in the legislation.

State, ex rel. Campbell, v. Cincinnati Street Railway Co. (1918), 97 Ohio St. 283, administrative board given authority to grant permit to operate public utility, where terms and conditions are specified in ordinance; *State, ex rel. Moock, v. City of Cincinnati* (1929), 120 Ohio St. 500, where city ordinance left the power with administrator to determine the terms and conditions under which permits for citywide garbage collection would be issued, but where ordinance had provided for specifications and competitive bids for such collection; *Yee Bow v. City of Cleveland*

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(1919), 99 Ohio St. 269, where the court held there to be no unlawful delegation, where the ordinance provided that an administrative officer could ascertain the health and sanitary conditions of the premises before issuing a license to conduct a laundry.

There is no question that the legislature of the state of Ohio has, by R. C. 715.43, granted to cities the general authority to provide for the collection of garbage, refuse and solid wastes.

Further, the Constitution of the state of Ohio, within the Home Rule Power of Municipalities, as contained within Article 18, Section 3, provides the basic authority for municipalities to perform such functions.

In the instant case, the city of Euclid has enacted a chapter of their city codified ordinances for just such a purpose. None of the sections of such chapter specifically state that it is the intent of such legislation to provide for the general collection of all of the garbage, trash or solid wastes of all of the citizens of the municipality; however, as stated by the trial court in his decision, "the language employed throughout the chapter clearly establishes the intent of council to engage in such a service." We shall allude to a number of references in the Euclid ordinance which, if they do not "clearly establish the intent of council to engage in such service," certainly give rise to a reasonable inference thereof.

"Sec. 941.02 Waste Not Collected

"(a) Except as otherwise herein provided, the city will not collect the following waste materials:

"* * * [then such noncollectable items are listed.]

"(b) [in this section those items which will neither be collected nor disposed of are listed.]"

Generally, then, relating to such section, it may reasonably be assumed that if the ordinance listed those items that would not be collected by the city, all others would be collected by the city.

"Sec. 941.06

"(a) The individual tenants of any dwelling, building or structure shall be responsible for providing and maintaining suitable approved containers for the disposal of waste materials when the dwelling, building or structure contains from one to five families inclusive.

"(b) The owner of any dwelling, building or structure which contains six or more dwelling units shall provide at least one garbage container of a capacity not less than one cubic yard and manufactured of a metal not lighter than sixteen gauge. If one container is not sufficient then the owner shall provide as many additional containers as may be required to serve the dwelling units. * * *"

Such section provides for the type of refuse containers as to be provided by the tenants in structures with one to five-family units, and by the owners of any building which contains six or more dwelling units. Again, such section would allude to the general intent of the city to provide for the refuse collections of all sizes of buildings, with any variable number of dwelling units.

There is to be found within the chapter referred to an additional pertinent section which provides for the service director of the city of Euclid to promulgate rules and regulations related to the collection, storage and disposal of rubbish and garbage. Such section is as follows:

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"941.23 Rules of Service Director

"The Service Director is hereby authorized to make such rules and regulations for the collection, storage and disposal of rubbish and garbage as he may believe necessary in the interest of public health, safety and welfare. Such rules and regulations shall have the same force and effect as ordinances when not repugnant thereto or to the Constitution of laws of the State. Such rules shall be posted for three consecutive weeks in five public places within the City."

As noted by the trial court, and we must agree with such conclusion, the ordinance may be construed in the sense that it provides for a general collection of the garbage and refuse of the municipality, with the exceptions from any such collection as noted within the ordinance itself.

Further, it may be concluded that within the framework of a general collection policy as established by ordinance, the service director may be granted the authority to make reasonable rules and regulations for such collection.

However, we must at this point state that the reasonable rules and regulations as enacted by the service director for carrying out the ordinance could not reasonably have included the formulation of categories or classifications of refuse producing citizens or entities, and the determination by such director as to who among such classifications or categories would, or would not, be provided refuse collection.

We hold the latter determination to be of a legislative nature, the type of determination which we feel the citizens of the municipality of Euclid have elected the members of their city legislative body to perform in their representative capacity.

The municipality, through its legislative officers, may, or may not, choose to provide certain services to its citizens such as refuse collection. Additionally, the legislative body of the municipality may also determine that only certain segments or elements of its citizenry shall be so served.

In keeping with the latter principle, the municipality may provide for certain classifications or categories to be served by the city in a given municipal function. However, any such legislation must be fair, reasonable, and based upon an evaluation of the necessities of the facts and circumstances, and must, in order to satisfy the constitutional equal protection guarantees, treat all similarly within any given classification or category.

In the instant case, we hold that the ordinance is not unconstitutional or invalid upon its face, in that it tends to be written in such a manner as to serve all in the municipality. And, further, the section giving the service director the authority to enact rules and regulations on its face purports only to grant the authority to make such rules and regulations that carry out the mandates of the ordinance, all of such not being unconstitutional.

Here, it is claimed that the mayor and the service director abused their discretion in making a determination allegedly pursuant to the ordinance above referred to, which determination restricted the general pickup of refuse by the city to one-, two- and three-family dwellings.

The record of this matter will show that in fact the mayor, after a discussion with the service director and the finance director, made the determination that the city coffers would not stand the continued pickup of trash from multiple dwelling apartments as well as from one-, two- and three-family dwellings.

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Such a determination was conveyed to, and discussed with, members of the city council who responded with a budget which would acommodate only such a lesser volume refuse pickup.

This act on the part of the city council, argues the city, in its assignment of error number I, constitutes an act of council establishing the categories to be served, and therefore obviates any abuse of discretion on the part of the mayor and the service director in making the determination as to who will be served.

On this latter point, we must disagree with the city. In order for the appropriate classification to be made and, more particularly, in order for the citizens of the municipality to know how such determination was made, and upon what basis, the legislative body must definitively act by ordinance which, in this instance, they did not do. Assignment of error number I of the defendants-appellees, city of Euclid, et al., is therefore dismissed.

The city council not having acted and, in lieu thereof, the mayor and service director having promulgated a rule in substitution of a legislative act, there has indeed been an abuse of discretion as found by the trial court.

As stated previously, municipalities may, or may not, provide services to their residents such as garbage and refuse collection as such municipalities are empowered so to do by constitution and state law. In the instant case of the city of Euclid, such municipality so chose to offer collection services for garbage and solid wastes, and did so through its enactment of chapter 941 of the codified ordinances. We have previously noted herein that a review of such codified ordinances concludes that such services are to be offered generally to the residents of the

municipality of Euclid, and not to any specific areas or categories within such city.

It is further noted within such chapter that the service director has been given the authority to promulgate rules and regulations to carry out the purpose of the chapter relating to the collection of garbage and refuse. It has further been noted that the city has the authority within any such ordinances relating to the provision of services, to provide reasonable classifications or categories of those who will be served in such functions. However, in the instance of this particular chapter 941, there have been no such classifications or categories set forth.

Thus, until such time as reasonable categories and classifications of those to be served are in fact established by ordinance of the municipality of Euclid, all must be served, and collection of garbage and refuse from all the citizens, be it single residence or multiple units, must be accomplished.

In the instant case there is nothing in chapter 941 which would empower the mayor or service director to cancel or discontinue the collection of this refuse from its citizens from certain types of dwellings and to continue the pickup from certain other types of dwellings. The rule-making authority of the service director, as set forth in the ordinance at section 941.23, does not encompass the power or authority to discontinue service, but only to make such rule and regulation to carry out the policy of the legislative body of the municipality.

The trial court, in entering its order, provided that such would become effective at a time subsequent to such order, and stated that the reason for such later effective date was "to permit counsel to consider the adoption of legislation establishing classification for collection of gar-

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bage and refuse * * *" and "if such legislation is adopted the mandatory injunction will not become effective on that date." Further in its opinion, the trial court expressed the view that the city council had the authority to enact reasonable classifications regarding the collection of garbage and refuse and indicated what those classifications should be.

As previously stated, we feel that the trial court was not in error in finding an abuse of discretion on the part of the mayor and the director of public service in promulgating rules which were not authorized under the ordinance relating to refuse and solid wastes. The trial court, however, in its decision and judgment relating to the mandatory injunction, issued such mandatory injunction as against the city on a wider basis than would have been permitted under the action. The court's order mandated the city of Euclid to collect *all* solid wastes from *all* apartments in the City, including the plaintiff's apartments, in the absence of the specified classification type legislation as set forth in the judge's decision. However, the relief as sought in this complaint was applicable to this plaintiff-appellant only, and not to all other apartment owners similarly situated as would have been in the case of a class action.

Further, it is felt that the court's decision and entry relating to the effective date of such mandatory injunction related to the subject matter of further legislation by and on behalf of the council of this municipality, with certain categories or classifications suggested by the judge in his decision, all of which we feel were beyond the necessity of the decision and judgment, and such was therefore merely dicta within the decision and had no real bearing on the relief as sought, or what was reasonably to be included within the decision and order.

As to the portion of defendants-appellees' assignment of error number IV to the effect that the trial court erred in finding that there was abuse of discretion on the part of the mayor and the director of public service, we hereby dismiss on the basis as discussed under defendants-appellees' assignment of error number I. Further, as relates to the portion of assignment of error number IV, relating to the alleged failure of the trial court to modify the injunction to clarify the classification legislation required to avoid the court's injunction, we hereby dismiss same inasmuch as that portion of the trial court's decision in this regard was dicta and the court's judgment entry, through which the court officially speaks, was not specifically based upon, or in reliance upon, a specific following of the court's prior suggestions as to the contents of a future ordinance.

As to that portion of assignment of error IV, relating to the mandatory injunction of the city of Euclid to collect solid wastes from all apartments in the city, including plaintiff's, this, as we noted previously, was an erroneous order and the relief as sought can only be related to the parties involved, in that such action as previously held within this decision was not a class action, but an individual action seeking relief for this complainant only.

Based upon all of the foregoing, the judgment of the Common Pleas Court is hereby affirmed as modified by this decision.

KRENZLER, *P.J.*, and MANOS, *J.* concur.